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No. 01-1018

IN THE

Supreme Court of the United States

PONDEROSA DAIRY, *et al.*
Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary,
California Department of Food & Agriculture, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

The Petitioners are Ponderosa Dairy, Parhump Dairy, Rockview Dairies, Inc., Darrel and Diane Kuiper, d/b/a D.Kuiper Dairy. The Respondents are William J. Lyons, Jr., Secretary of the California Department of Food & Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food & Agriculture (hereinafter "CDFA").

CORPORATE DISCLOSURE STATEMENT

None of the corporate Petitioners have issued stock or securities that are publicly traded, and none of the petitioners have a corporate parent, subsidiary or affiliate that has issued publicly traded stock or securities.

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INTRODUCTION

The lead argument of the Respondent California Department of Food and Agriculture ("CDFA") for avoiding certiorari review is a disclaimer of national impact on the dairy industry, and on USDA's Federal Milk Order Program, if the 9th Circuit's holding—that Congress granted California "sweeping" authority to protect its milk market from competition without any Commerce Clause limit—is allowed to stand. Respondent's Brief at 1, 11-12. CDFA's argument asks this court to suspend belief in elementary law of supply and demand, to disregard judicial experience in inter-regional dairy disputes, and to avoid reliance on prior acknowledgments of both USDA and CDFA of the impact of California on the national dairy industry and federal dairy

programs. On the merits, CDFA's claim that the lower court faithfully applied the "clear statement" rule is disproved by this Court's recent decision in *Raygor v. Regents of the University of Minnesota*, 534 U. S. ____, 122 S.Ct. 999 (2002)

ARGUMENT

I. THIS COURT'S EXPERIENCE, AND UNQUALIFIED DECLARATIONS OF USDA AND OF CALIFORNIA'S CDFA, CONFIRM THE NATIONAL SIGNIFICANCE OF THIS CASE.

This Court's experience with the national impact of protectionism in the dairy industry includes not only a "surprisingly large number of . . . Commerce Clause cases," *West Lynn Creamery v. Healy*, 512 U.S. 186, fn. 22 (1994), but also application of Congress' express prohibition, since 1935, against the use of regulatory trade barriers by the U.S. Secretary of Agriculture. *Lehigh Valley Cooperative v. United States*, 370 U.S. 76, 84-97 (1962) (concluding, on invalidating a pool obligation and credit scheme similar to the contested CDFA rule, that 7 U.S.C. § 608c(5)(G) "was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products."). The milk market in the United States has become more national and regionally interdependent since these decisions.

Just over two years ago, the U.S. Department of Agriculture completed comprehensive reform of the Federal Milk Order Program. In that process, USDA relied on a national model of milk and dairy product supply and demand—the Cornell University U.S. Dairy Sector Simulator—to guide the structure of reformed federal milk regulations. 64 Fed. Reg. 16025, 16037-38 (Apr. 2, 1999). Noting the desirability of minimum federal prices to reflect "the national supply and

demand for manufacturing milk," USDA expressly acknowledged the effect of California milk pricing on its federal reform deliberation process.

> Comparisons to the California prices are included because many commenters expressed the view that the proposed rule resulted in prices that put plants regulated by Federal orders at a competitive disadvantage to California plants and that alignment with California pricing was essential. Most commenters did not express the view that Federal order prices should equal California prices, but that Federal order prices should be in alignment, *i.e.* "reasonably close". [*Id.* at 16100-16101].

The California Department of Food and Agriculture has likewise admitted the national impact of its dairy pricing programs. In a recent rulemaking decision, CDFA stated:

> California's increasing rate of milk production and the increasing number of cows both strongly suggest that there are ample economic incentives to produce more milk. Since Class 4a and 4b [milk for butter, powder and cheese] prices are among the lowest in the nation . . . it is reasonable to conclude that the current Class 1 prices levels provide some of existing incentives to produce more milk. *As California's share of the national supply grows ever larger, its increasing rate of annual production increase can dramatically affect the delicate balance between the national milk supply and commercial demand.*[1]

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[1] California Department of Food and Agriculture, "Statement of Determination and Order of the Secretary of Food and Agriculture regarding proposed amendments to the Stabilization and Marketing Plans for Market Milk for the Northern and Southern California Marketing Areas Based Upon a Public Hearing Held on September 21, 1999" (Oct. 21, 1999) at 46 (reproduced in more complete part in the Reply Brief, Appendix 21a-13a, of Hillside Dairy, No. 01-950). This excerpt illustrates a criticism by Eastern dairy analysts that California's relatively high prices for Class 1 milk are used to cross-subsidize relatively low

II. THIS COURT'S RECENT OPINION IN *RAYGOR v. REGENTS OF THE UNIVERSITY OF MINNESOTA* UNDERSCORES THE ERROR IN THE LOWER COURT'S ARTICULATION AND APPLICATION OF THE "CLEAR STATEMENT" RULE.

On the merits of whether or not the lower court faithfully followed the "clear statement" rule of statutory construction, applicable whenever Congress intends to alter the usual constitutional balance between the States and the Federal Government, Respondent argues: "Congress made a 'clear statement' of intent to exempt *some* aspect of California's regulation of milk production. The only dispute is over the intended scope of the exemption." Respondent's Brief at 14. Respondent then proceeds to assert that the lower court correctly concluded that Congress implicitly intended to include California's milk pricing and pooling laws because these are deemed by California to work "as a means of 'effecting' California's fluid milk standards." *Id.* at 15.

Initially, this argument incorrectly implies that the contested pooling provisions were adopted by CDFA with

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prices for Class 4 milk. *See* Robert Cropp, Cornell Program on Dairy Markets and Policy "MILK PRICING AND POOLING IN CALIFORNIA" (Cornell University, March 1996) (http://www.cpdmp.cornell.edu/), and Edward V. Jesse, "Section 102: The California Make Allowance Issue" (Marketing & Policy Briefing Papers, University of Wisc. Madison, No. 46, Apr. 1994) (http://aae.wisc.edu/www/pub/mpbpapers/mpb46.pdf). Although Respondent's brief (at 11) professes inconsistency in arguments that commodity prices in a protected market can be both higher and lower than would exist in a freely competitive marketplace, CDFA has elsewhere simply acknowledged that: "All classified pricing systems, including those used in federal orders and in California, have been criticized for using high fluid milk prices to subsidize manufacturing milk prices." CDFA, "California Dairy Review" (Vol. 5, Issue 9, Sept. 2001) at 4 (http://www.cdfa.ca.gov/dairy/pubs/DairyRvw/index.html).

some explanation or justification that they would help effect California's milk standards. There was no such rationale in the state agency's decision. It also incorrectly implies that the lower court's opinion was limited to pricing or pooling rules adopted for the purpose of promoting packaged fluid milk standards compliance. It was not. Nor does CDFA, in any event, cite to any authority that would permit a state by rulemaking ritual to fix the scope of its own Commerce Clause exemption.

The lower court's error in reading the "clear statement" rule to encompass implied inclusion of milk pooling rules, to which no hint was made in Section 144 of the Farm Bill, is reinforced by this Court's decision last month in *Raygor v. Regents of the University of Minnesota*, 534 U. S. ___, 122 S.Ct. 999 (2002). In an 11th Amendment context, *Raygor* clarified that the "clear statement" rule requires courts to examine acts of Congress "for a clear statement of what the rule includes, not a clear statement of what it excludes." Section 144 of the 1996 Farm Bill expressly includes only California laws "to establish or continue to effect" packaged milk composition and labeling requirements (Respondent's Brief at 2). The lower court misapplied this Court's "clear statement" rule in expanding Section 144 to other regulations.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Alternatively, the Petition should be granted, the decision of the court of appeals vacated pursuant to Supreme Court Rule 16.1, and the case remanded for further consideration in the light of *Raygor v. Regents of the University of Minnesota*, 534 U. S. ___, 122 S.Ct. 999 (2002).

Respectfully submitted,

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